U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 1 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a cellular phones and accessories business. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated December 21, 2011, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on January 28, 2011. The proffered wage as stated on the ETA Form 9089 is $94,411.00 per year. The ETA Form 9089 at part H states that the position requires a bachelor's degree in computer science, information science or related field and 60 months of experience in the job offered or 60 months of experience in a related occupation, systems analyst, database administrator, or related field.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claims to currently employ 33 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary, he claims to have been employed by the petitioner since April 3, 2009.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is $94,411.00. The record of proceeding contains copies of IRS Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary as shown in the table below.

- In 2011, the IRS Form W-2 stated total wages of $24,059.01 (a deficiency of $70,351.99).
- In 2012, the IRS Form W-2 stated total wages of $25,586.41 (a deficiency of $68,824.59).

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd,* No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The proffered wage is $94,411.00. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The AAO's Request for Evidence (RFE) dated February 5, 2013 requested that the petitioner provide a copy of its Internal

Revenue Service (IRS) tax returns complete with schedules and attachments for 2011 and 2012. In response to the AAO's RFE, counsel states that the petitioner's income tax return for 2012 is not yet available and that a copy of the Request for Automatic Extension is attached as evidence. Contrary to counsel's statement, the record of proceeding contains a request for automatic extension for the 2011 tax year, not 2012. It is noted to date, the petitioner has not provided a copy of its income tax return for 2012.

The petitioner's 1120S[2] tax return demonstrates its net income as shown in the table below:

- In 2011, the Form 1120S stated net income of -$158,779.00.

Therefore, the petitioner has failed to establish its ability to pay the difference between wages paid to the beneficiary and the proffered wage for 2011 through its net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its net current assets as shown in the table below:

- In 2011, the Form 1120S stated net current assets of $771,032.00.

Although the net current asset amount for 2011 exceeds the proffered wage amount, USCIS records indicate that the petitioner has filed multiple immigrant visa petitions since 1998. The AAO requested in the RFE that the petitioner submit detailed information (names, receipt numbers, priority dates, dates of employment, current status, proffered wage amounts, wages paid to each beneficiary, and Forms W-2 or Forms 1099-MISC) for each beneficiary for whom

---

[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the petitioner had filed a Form I-140. In response to the RFE, the petitioner indicated that it has filed Form I-140 petitions for six employees; and that three are currently active, and three are inactive since the beneficiaries have already obtained Legal Permanent Residence and are no longer working for the petitioner. The petitioner provided a table listing the three active beneficiaries' name, receipt number priority date, employment start date, employment end date, proffered wage, wage paid in 2011, the deficiencies, net current assets, and the beneficiaries' current status; however, it failed to provide the particulars of the other three beneficiaries that it claims to have sponsored who have obtained permanent resident status. If such status was obtained in 2011 or 2012, the petitioner would still need to show the ability to pay these beneficiaries through the date the beneficiaries obtained lawful permanent residence status in 2011 or 2012.

As no information was provided concerning these other three beneficiaries in response to the AAO's Request for Evidence (RFE), such as: the beneficiaries' names, A file numbers, the dates the labor certifications were filed, the proffered wage of each beneficiary, and the date the beneficiaries obtained lawful permanent residence status, the AAO is unable to determine whether the petitioner has the ability to pay the sponsored beneficiary of the instant petition and the other sponsored workers. Further, USCIS electronic records indicate that the petitioner has filed more than six immigrant petitions since 1998. Because no information was provided to establish whether such petitions are still pending, their names, the proffered wage for each, the priority date for each, etc., the AAO does not find that the petitioner has established the ability to pay the proffered wage for all the sponsored beneficiaries from the priority date of the instant petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner has not met its burden of proof.

USCIS must take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ.

The petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the

Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

Therefore, for the year 2011, the petitioner has not demonstrated that it had sufficient net current assets to pay the difference between the wages paid and the proffered wage and wages of the multiple beneficiaries beginning on the priority date and continuing to the present. Further, the petitioner has not submitted its tax return for 2012 as noted above.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in not properly taking into account the totality of circumstances in assessing the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner's bank account balances demonstrate its ability to pay the proffered wage in 2011 and should have been considered by the director in lieu of the petitioner's income tax return for 2010, when its 2011 income tax return was not yet available. The petitioner submitted a copy of its bank account statements for 2011 and 2012. However, reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable, unavailable, or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

On appeal, counsel asserts that the petitioner has demonstrated its ability to pay the proffered wage through its net current assets in 2011, according to the language in a memorandum dated May 4, 2004, from [redacted] Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Interoffice Memo. from [redacted] Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is January 28, 2011. Thus, the petitioner must show its ability to pay the proffered wage not only in 2011, but it must also show its continuing ability to pay the proffered wage in 2012 and thereafter. Demonstrating that the petitioner is paying the full proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Furthermore, based upon the evidence in the record of proceeding, the petitioner has filed multiple Forms I-140 petitions and has not demonstrated its ability to pay the full proffered wage amounts of all beneficiaries in 2011 or 2012.

The evidence presented on appeal and in response to the AAO's RFE cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in 2011 and 2012.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in computer science, information science or related field and 60 months of experience in the job offered or 60 months of experience in a related occupation, systems analyst, database administrator, or related field. The labor certification also indicated that the petitioner was willing to accept a foreign educational equivalent. The record of proceeding contains a copy of the beneficiary's bachelor's degree in Computer Science from the [redacted] dated December 16, 2004. On the labor certification, the beneficiary claims to qualify for the offered position based also on his experience as a database administrator.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). As noted above, the regulation states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree...." *Id.* Therefore, the petitioner must demonstrate that the beneficiary has five years of progressive experience in the job offered or in a related field subsequent to December 16, 2004, the date he was issued his bachelor's degree.

The beneficiary indicated on Part J of the labor certification that he was employed by: (1) [redacted] as a data entry operator from September 11, 2003 to March 31, 2004 (8 months), (2) [redacted] as a database administrator from October 1, 2005 to May 15, 2006 (6 ½ months), (3) [redacted] as a database administrator from May

30, 2006 to April 2, 2009 (2 years, 11 months); and (4) as a database administrator from April 3, 2009 to the present (2 years, 8 months).

The record contains the following documents:

- An employment letter from the verifications supervisor of who stated that the company employed the beneficiary as a data entry clerk from September 8, 2003 to May 2, 2004. The declarant did not provide a description of the beneficiary's job duties. In addition, this position is dated prior to December 16, 2004, the date the beneficiary received his bachelor's degree; and therefore, cannot be used to establish the beneficiary's job experience.
- An employment letter from the CFO of who stated that the company employed the beneficiary as an IT manager for several months starting in 2005. This statement is inconsistent with the beneficiary's statement on the labor certification in which he stated that he had been employed by the company as a database administrator. In addition, the declarant does not provide specific dates of employment or a specific job description for the beneficiary.
- An employment letter from the vice president of who stated that the company employed the beneficiary as a database administrator from May 30, 2006 to April 2, 2009. The declarant describes the beneficiary's job duties.
- An employment letter from the vice president of who stated that the company employed the beneficiary as a database administrator from April 3, 2009 to the present

The beneficiary listed the petitioner as an employer. However, in response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested," the petitioner answered "no." In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[4] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1 that

[4] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
>
> . . .
>
> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

his position with the petitioner was as a database administrator. The job duties have not been shown to be substantially different from those he will be performing for the petitioner under the current petition. If the experience gained with the petitioner is substantially comparable, according to DOL regulations, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. The record does not reflect through the position descriptions, the percentage of time spent on various duties, organization charts or payroll records that the job duties are different under the current petition for a systems analyst more than 50% of the time. Thus, this experience may not be considered. As such, the beneficiary did not have five years of progressively responsible experience as of the priority date.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 2011. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. The petitioner has failed to establish the beneficiary's qualifications as of the priority date.

Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an alternative grounds for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.